The Madras Law Journal.

Vol. XVIII.] FEBRUARY, 1908. [Part IV.

## THE LIMITATION BILL.

The public and the members of the legal profession have to be thankful to the Law Member, Mr. Erle Richards, for giving them a consolidated Act upon a subject which is of frequent application, *viz.*, the Limitation Law. One immediate circumstance which moved the Law Member and the Government to undertake legislation of this kind is the hardship said to have been caused to the holders of mortgages of immoveable property in forms other than what is known as the English form, over a large part of India, by reason of the recent decision of the Judicial Committee in the case of *Vasudeva* v. *Srinivasa*.[1] We shall refer to the decision of the Judicial Committee and to the provisions introduced in the Bill to alter the law as laid down by the Judicial Committee in their proper places. But the hardship alleged to have been caused by decision of the Privy Council could have been removed by an amending Act. But as the Limitation Act had already been amended by no less than eleven different enactments, the Government very wisely conceived the idea of codifying the whole law in one Act. We must, therefore, congratulate the Government and Mr. Erle Richards specially for their attempt to codify in one Act the whole of the statutory law on the subject of limitation and for settling some doubtful points in the Limitation Act. We wish they had taken some more trouble and tried to set at rest some more doubts upon other equally, if not more, important provisions of the present Limitation Act.

Coming to the provisions of the Bill we find that S. 1 of the Act proposed to be repealed is reproduced in the new Bill as S. 1, Clauses 1 and 2, and S. 31, Clause 2. The last part in para 2 of S. 2 of the Act deals with the saving of the Contract Act

1 (1907) I.L.R. 30 M. 426.

IX of 1872. S. 25 is reproduced in S. 31, Clause 1 (*a*). The 3rd para of S. 2, which is repealed as having time-expired, has necessarily to be provided for in the new Bill, which provides for this in S. 32. But the first part of the 2nd para of S. 2 which deals with references is, however, not reproduced; so also the saving of titles already acquired, referred to in the said para, is not reproduced.

The saving of title is expressed in the following language in the Act:—

" And nothing herein or in the Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act, or under any enactment thereby repealed."

It is not, however, intended that the law should be changed in this respect and that titles acquired and right to sue barred under prior Acts should be defeated or revived as the case might be. Apparently there is no necessity for inserting a provision of this sort, after the General Clauses Act X of 1897. S. 6 of this Act enacts:—

" Where this Act, or * * * repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears, the repeal shall not (*a*) revive anything not in force or existing at the time at which the repeal takes effect; * * * or (*c*) affect any *right*, privilege, obligation, or liability *acquired*, accrued or incurred under any enactment so repealed; * * * or (*e*) affect any investigation, legal proceeding or *remedy* in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid."

It may, however, be a question whether the above section will cover the case of a right to sue barred under previous Acts and prevent the revival of any right so barred. The earlier General Clauses Act I of 1868 did not contain any provision corresponding to S. 6 of the present General Clauses Act. Hence, while it was necessary in the Act of 1877 to state specifically that nothing therein contained should affect any title acquired previously to that Act, no such necessity is apparently felt by the Legislature now. For a similar reason, S. 2 of the Act omits the definition of the word " registered." It is defined in S. 3, Clause 45, of the General Clauses Act.

The definition of the term " good faith" in S. 3, Clause 20, of the General Clauses Act is expressed somewhat differently from the definition of the same expression in the present Limitation Bill, which, however, in no way alters the previous definition in the Limitation Act. According to the definition in the present

Bill; nothing shall be deemed to be done in good faith which is not done with due care and attention, so that if any act is done without due care and attention, there is an absence of good faith. Negligence denotes the absence of good faith, so that anything done negligently is not done in good faith. According to the definition in the General Clauses Act, however, doing an act negligently is not the test of its not being done in good faith. The test of good faith is honesty and not negligence. Clause 20 of S. 3 of the General Clauses Act 1897 enacts :—" A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not."

S. 6 of the Bill seems to be badly worded. It begins by saying: " Wherever it is shown to the satisfaction of *the* Court":— here a particular Court is apparently contemplated, but in the last part of S. 6 the same language is not adopted.—The section of the Bill in this part runs thus :—" such appeal or application shall for all purposes be deemed by *all courts*." It is not seen why the plural, *viz.*, "all courts" should be used here. The reference here is only to the court mentioned in the first part of S. 6, *i.e.*, the court that is satisfied that the appellant has been misled to file an appeal or an application for review after time; hence the use of the plural is out of place. In S. 8 of the new Bill a change is introduced in order to include the case of joint- decree-holders; the language adopted would seem to be that suggested by Sir *Bhashyam Aiyangar* J. in *Periasami* v. *Krishna Ayyan.*[1] Sir *Bhashyam Aiyangar* was not, however, using any language for suggesting any alteration in the law but was simply meeting the argument that S. 8 could apply to applications. With reference to that argument he observed that while the language of S. 7 of Act IX of 1871 was altered in S. 7 of Act XV of 1877 so as to include applications, S. 8 of Act IX was not so altered, and that if the Legislature had intended to enlarge the scope of this latter section so as to include the case of applications also, one would have expected the Legislature to have altered the language of the section into what is S. 8 of the present Bill. He could not expect this alteration of the language of the section by the Legislature as one of several persons entitled jointly to make an application could not under the processual

1. (1902) I.L.R. 25 M. 481 at 448.

law give any valid discharge binding upon all. So that when we know as a matter of law that one of several persons jointly entitled to make an application cannot give a discharge it is meaningless to add those expressions to S. 8. The latter clause alone will apply to such a case. In the case of joint claimants or creditors who are not joint decree-holders the substantive law of the parties will alone afford a solution of the question whether one of them is entitled to give a discharge or not. The answer to that question depends upon the personal law of the parties concerned. The language employed is best adapted only to such a case. It is not adapted to a case where we know, as in the case of joint decree-holders, one of them is not entitled to give a discharge under any circumstance. It seems best therefore to effect the alteration proposed by an explanation to the section. Again, it is not seen why this cumbrous language should be adopted. If it is thought that the exigencies of drafting would not permit a variation in the construction of the sentence, we should think that the same purpose may be served by stating simply "where one of several persons jointly entitled to institute a suit or make an application is under such disability, &c." This has, at any rate, the merit of following the language employed in S. 7.

The next important change that is made is in S. 11 of the Bill. According to the English law, claims against express trustees for an account of the trust property are not barred by the Statute of Limitations except in cases governed by S. 8 of the Trustee Act (1888) 51 & 52 Vict. C. 59. The decisions of the Indian Courts proceeded, however, upon a different footing. According to them S. 10 had no application to such a case, and a suit for an account against a trustee for more than six years would be barred under Art. 120. The effect of the decisions in Calcutta and Bombay is correctly stated by the Mover of the Bill in the Statement of Objects and Reasons. In Madras the decision in *Sarada Pershad's* case [1] was impliedly accepted in *Sethu* v. *Subramanya.*[2] The question that was left open in *Ranga Pai* v. *Baba*[3] was whether S. 10 applied to a suit charging the trustee with breaches of trust and claiming

1. (1880) I. L. R. 5 C. 910 2. (1887) I.L.R. 11 M. 274 at pp. 278-279.
3. (1896) I. L. R. 20 M. 398.

an account. But although this question was left open, the Court in the same case applied the rule of limitation contained in Art. 120 to a claim for an account which was sought to be enforced by one co-trustee against the others to protect his own interest and not except indirectly in the interests of the trust. In the present section the Legislature has wisely thought fit to bring the case of an account within the principle of S. 10 of the Act of 1877 which is replaced by S. 11 of the Bill. Suits against trustees on behalf of the trust for the purpose of following in their hands the proceeds of the trust property or for an account of such property or proceeds would hereafter be saved from limitation. But although the change intended proceeds upon a correct principle, the change seems to extend the law as understood in England; for the section does not contain the limitations which are allowed there—see English Trustee Act of 1888, 51 & 52 Vict. Cap. 59, S. 8. According to the English law in the case of an innocent breach of trust, such as honestly investing trust money upon insufficient security, the trustee may plead limitation—*In re Somerset.*[1]

While on this subject, it may be pointed out that it would have been well in the interests of public, charitable and religious trusts in this country if the Government had thought fit to change the rule of limitation now obtaining with respect to suits for recovery of trust property from alienees and persons in wrongful possession. Twelve years are hardly sufficient and seeing that according to some of the decisions persons interested are not entitled to bring suits for possession and that only persons who are appointed trustees after removal of old trustees are entitled to bring suits a great hardship arises as necessary proceedings for removal of trustees are dilatory and a great deal of time is taken before the old trustees are removed and new trustees appointed and by this time suits for recovery of trust property from the person in possession become barred. We would suggest that a longer period of limitation should be given for such suits and that provision should be made that the commencement of proceedings against trustees for breach of trust should operate in stopping the limitation from running when the breach of trust charged is the wrongful alienation. If the period of 60 years suggested by Sir *Bashyam Aiyangar* J. for suits to recover possession of immoveable property forming

1. (1894) 1 Ch. 231.

the endowment of a public, charitable or religious institution which has been improperly alienated or held adversely to the institution [see *Vidyapurna* v. *Vidyanidhi*[1]] is thought to be too long (we do not think there can be any justification for so thinking) at any rate the Legislature may adopt a period of 30 years. We hope the Legislature will give effect to this long-felt want.

Clause 16 embodies a very useful and very reasonable suggestion made by Sir *Bashyam Aiyangar* J. in *Rungayya* v. *Nanjjappa*[2] for excluding the time during which execution has been stayed by an injunction or order. But this will not cover a case where the decree-holder has to bring a suit under S. 283, C. P. C. The time occupied by such suit will not be excluded under this clause. Clause 18 removes a real hardship under S. 424, C.P.C. A suit cannot be brought against the Government or the Secretary of State or any public officer without giving a notice in writing, and no suit can be brought until the expiry of two months next after the notice is so delivered. Although S. 424 creates such a bar still no exclusion of time was allowed under the Limitation Act. The result of it was that where the period of limitation allowed by the law was only 30 days or a month the private suitor was without any remedy. We must thank the Government for recognising even at this distance of time such an injustice to the suitor. Clause 21 which corresponds to S. 19 of the present Act is made so as to include an application for execution. A similar change is made in clause 22. This would overrule the view taken in Madras and would bring the law there into harmony with that of the other Courts. Acknowledgments or payments save the bar of limitation as regards judgment-debts even according to English law. If acknowledgments will save limitation, payments also ought to, and this is indicated by the explanation to Clause 22. The effect of acknowledgments or payments made by guardians of minors is stated in the clause newly introduced—Clause 23. There was a good deal of conflict upon this question in the Indian High Courts, and it is well that the Legislature has settled the question. We should have desired the Legislature to include expressly a manager of a joint family as a person duly authorised within the meaning of Clause 23. Where

1. (1904) I.L.R. 27 M. 435 at p. 462. 2. (1903) I. L. R. 26 M. 780.

the junior members of a joint Hindu family, though adults, are bound under the law by debts contracted by the manager, they must equally be bound by acknowledgments or payments made by the manager. Where the manager represents under the law the junior members, although they are adults, in transactions having for their object the contracting of debts it does not appear clear why the manager should not represent them for the purpose of making acknowledgments or payments so as to save limitation. There is an *obiter dictum* of the Madras High Court to this effect in *Chinnaya Nayudu* v. *Gurunatham Chetti*.[1]. But in *Narayana Ayyar* v. *Venkataramana Ayyar*[2] it is suggested, at page 234, that where a creditor deals with all the members of a joint family he cannot rely upon an acknowledgement made by the managing member, but we do not think there is any justification for this distinction. As the parties, so the legislature ought to proceed upon the supposition that generally the managing member is a person duly authorised. Apparently courts may be induced to take this view. But where the Legislature has thought fit to explain the expression "Agent duly authorised in this behalf" any doubts on the question here indicated may be removed by including the case of the manager expressly. In Cl. 28, Sub-cl. 2, provision is expressly made for acquisition of easements against the Government. Under S. 26 which corresponds to the present Cl. 28 only 20 years are necessary for the acquisition of a right of easement, and, notwithstanding some decisions to the contrary, we feel that under Act XV of 1877 there can be no great difficulty in holding that S. 26, as it at present stands, applies to the Government also. That is the only sound principle of construction to be adopted. The Government while trying to remove by a sub-clause any real doubt in the matter fixes a period of 60 years for an acquisition of easement as against Government. Although under Art. 149 of the Limitation Act that is the period applied, we cannot see why the same period should apply in the case of rights by way of easement. At the highest it ought not to be more than 30 years.

The next important provision that is made in the Bill is that contained in Cl. 33. The Statement of Objects and Reasons shows that thereby it is intended to remove the hardship arising from the decision of the Judicial Committee in the recent case of

1. (1882) I. L. R. 5 M. 169 at p. 170. 2. (1902) I.L.R. 25 Mad. 220 ; F.B.

*Vasudeva* v. *Srinivasa*[1] In the note to Cl. 33 (1) it is stated: "Previous to this decision, the law, as laid down in the decisions of the High Courts of Bombay, Allahabad and Madras was, that Art. 147 applied to every suit by a mortgagee in which he asked either for foreclosure or for sale.—*Motiram* v. *Vital*[2]; *Datto* v. *Vithu*[3]; *Narayana* v. *Venkata*;[4] *Shib* v. *Ganga*[5]. The result has been that in the said territories a large number of mortgage suits for which the period of limitation hitherto had been believed to be sixty years would be found to be barred by limitation." We think that the Legislature proceeds upon an erroneous assumption so far as the territories under the jurisdiction of the Madras High Court are concerned. At any rate, prior to January 1902 when the decision of the Full Bench in *Narayana Aiyar* v. *Venkataramana Aiyar*[4] was pronounced, the view taken by the Madras High Court was throughout, with perhaps one solitary exception, that the shorter period provided for in Art. 132 applied, and that Art. 147 was not applicable to suits for sale. The sense of the profession was also in accordance with this view and the decision of the Full Bench in *Ramachandra Rayaguru* v. *Modhu Padhi*[6] expressly affirmed this view which was only in accordance with the prior decisions. This view was followed at any rate up to 20th January 1902 when the decision of the Full Bench in *Narayana Aiyar's case*[4] already referred to was pronounced. Even after that decision we can refer to a number of cases in which some of the learned judges who took part in that Bench distinctly held that it did not apply to hypothecations, and that the decision of the Full Bench only turned upon the special instrument in that case That the decision in *Narayana Aiyar's case*,[4] proceeded not upon the general construction of Art. 147 but upon the special nature of that case would appear from the judgment of the Full Bench itself. The Full Bench there observed: "In our judgment the period of limitation for a suit for sale upon the instrument in question in the present case is that prescribed by Art. 147 of the Second Schedule of the Limitation Act." It was only in 1905 that this decision was applied to all cases of mortgages including hypothecations.—see A, S. No. 164 of 1902; 15 M. L. J., Recent Cases, page 1; and the decision in

1 (1907) I.L.R. 30 M.426.
2. (1888) I. L. R. 13 Bom. 90; F.B.
3 (1885) I. L. R. 20 Bom. 408; F.B.
4. (1898) I. L. R. 25 M. 220.
5. (1884) I. L. R 6 A. 551; F.B.
6. (1898) I. L. R. 21 M. 326; F.B.

the case which was upset by the Privy Council in the recent case of *Vasudeva* v. *Srinivasa.*[1] See also *The Chairman, Municipal Council, Rajahmundry* v. *Suserla Venketeswaralu.*[2] Prior to these decisions there was no question about the applicability of the shorter period under Art. 132 to suits for sale in enforcement of hypothecation debts, and, at any rate certainly prior to the decision of the Full Bench in *Narayana Aiyar* v. *Venkatarama Aiyar*,[3] there was no question of any of the litigants or the members of the profession having been misled by any ruling of this Court into the belief that such longer period would apply. There was no idea entertained prior to the decision of the Full Bench in *Narayana Ayyar's case* [3] by persons holding hypothecations that they had sixty years to bring their suits for enforcing their debts. It was only the decision in *Narayana Aiyar* v. *Venkatarama Aiyar*[3] that made sleeping dogs wake, as it were, and persons who did not bring suits because under the law, as then understood, their claims had out and out become barred, were emboldened to bring suits upon the strength of this ruling. We have, therefore, no hesitation in saying that absolutely no hardship can be felt by holding the shorter period of limitation to be applicable to hypothecations already barred at the date of the Full Bench decision. The case of hypothecations not so barred, but which would now be barred if the shorter period should be applied, might stand on a different footing. But if it should be thought that provision should be made for all hypothecations in the Madras Presidency, it would be only consistent if relief were also given to the respondent in the Privy Council Case. That he cannot claim the benefit under the present provision will appear from the fact that Clause (2) of S. 33 of the Bill enables a Court to restore only a suit dismissed on the ground of limitation after the 22nd July 1907. In the Privy Council case the judgment was pronounced on the 22nd July 1907. Why should he not have also the benefit? But to enact by statute that even this case should be revived is hardly consistent with any known principles of legislation. On the whole, therefore, we think that effect should be given to the Privy Council decision in all cases arising in this Presidency. The hardship or the erroneous belief stated by the Legislature as a ground for exemption is,

1. (1907) I. L. R. 30 M. 426. P. C. 2. (1901) 16 M. L. J. 53.

3. (1902) I.L.R. 25 M. 220. F. B.

as has been shown, for the most part a myth with little foundation in fact.

Coming now to the articles we find that the first change that is made is in Art. 5. This is necessitated by the change made in the new Civil Procedure Code. Under the new Code suits triable summarily are not confined to suits on negotiable instruments as they were under the Code of 1882. Suits against trustees for breaches of trust are also triable summarily. But such suits must be filed within 6 months from the time when the breach of trust occurs. But then under S. 11 of the Bill no limitation can run as against a trustee. The question is whether Art. 5 is subject to the exemption contained in S. 11. Similar considerations will arise when the question is as to the applicability of the exemption under S. 7. There is, of course, a slight difference in this case which will be presently mentioned ; but barring this, the two seem to stand upon the same footing. If Art. 5 is subject to S. 11 it must equally be subject to S. 7. S. 11 of the Bill enacts that "notwithstanding anything *hereinbefore* contained, no suit against a person in whom property has become vested........shall be barred by any length of time." As the schedule and Art. 5 in that schedule come after S. 11 it may appear by reason of the expression "notwithstanding anything *hereinbefore* contained" that Article 5 is not governed by S. 11. But this is really not so. S. 3 of the Bill enacts that subject to the provisions contained in Ss. 4 to 27 (inclusive) "every suit instituted * * * after the period of limitation prescribed therefor by the *first schedule* shall be dismissed * *" Hence, Schedule I and Art. 5 of the same are among the provisions which *precede* S. 11. If S. 11 applies and Art. 5 is to be construed subject to the rule contained in S. 11, there is no limitation whatever. It that be so, what is the use of providing expressly that a suit relating to a breach of trust must be brought within 6 months from the time when the breach of trust occurs? Similar remarks will apply to the case of persons under a disability (S. 7). It is clear that Art. 5 must be read subject to S. 7 of the Bill and the person will have, therefore, under S. 9, 6 months' time from the time the disability ceases. This is something, as some effect is at any rate given to the period of limitation, whereas in the case of S. 11, Article 5 has no effect whatever given to it because under S. 11 there is no limitation. We may ask, is not this against the policy of prescribing a period of limitation

for suits triable summarily? Summary trials are provided for as the legislature thinks that in such cases there cannot ordinarily be any defence, or if there be any defence, leave may be given under certain limitations to defend the suit and that speedy justice should be administered. To hold that the exemption provisions of the Limitation Act apply to the period of limitation prescribed for the enforcement of such summary remedies is against this policy. There is no injustice whatever in making those provisions inapplicable to Article 5 as the ordinary suit (not triable summarily) will be subject to those provisions. We, therefore, suggest that provision should expressly be made that the rule contained in Art. 5 is not subject to the exemptions contained in Ss. 7 and 11. Again, we do not see why in S. 11 the legislature should use the expression "*hereinbefore contained.*" The same effect is obtained by saying "*herein contained.*"

We welcome the omission of Art. 35 of the present Act and hope that Courts will hereafter take the sensible view that the cause of action is *de die in diem* and will not even after this change, strive to spell out another period of limitation under different articles. There can be no doubt that the intention of the Legislature is to give legislative sanction to the view—the only sound and right view to be taken of the Hindu and Mohomedan Laws on the point—taken by the Allahabad High Court in *Binda* v. *Kaunsilia*,[1] that "the withholding of conjugal rights by either party is a continuing wrong and that a claim for restitution cannot be barred by limitation."

The next changes of importance which may be referred to are those made in Arts. 99 and 111. The changes in Art. 99 give effect to the view taken by *Sir V. Bhashyam Aiyangar* J. in *The Raja of Vizianagaram* v. *Setrucherla.*[2] An explanation is added which removes the doubt raised in *Fuckoruddeen* v. *Mohima Chunder.*[3] So that even where the payment is not made by the co-sharer but the joint liability is discharged by involuntary sale of his property the co-sharer whose property has been so sold will come under the article. It is intended by the change in Art. 111 to give effect to the view that it applies only to suits to enforce the personal liability of the purchaser and not to a suit for

1. (1890) I.L.R. 13 A. 126. 2. (1903) I.L.R. 26 M. 686.
3. (1878) I.L.R. 4 C. 529, 531.

enforcing the charge (or lien) for unpaid purchase money. The Calcutta, Bombay and Allahabad decisions always held that Art. 132 applied to a suit to enforce a charge. The Madras decisions were at one time the other way. But after the decision of the Judicial Committee in *Webb* v. *Macpherson*,[1] the Madras Court reconsidered these decisions and took the view which is now intended to be embodied in the present Bill—see *Ramakrishna* v. *Subrahmania.*[2] We have, however, some doubts whether the alteration in the language sufficiently gives effect to this intention. The article in the Act of 1877 runs thus : "By a vendor of immoveable property *to enforce his lien for unpaid purchase money.*" Under the present Bill it is proposed to omit the words "to enforce his lien." The article then runs thus : "By a vendor of immoveable property for unpaid purchase money." But is not a suit by a vendor for recovering the purchase money not paid to him by sale of the property sold a suit "for unpaid purchase money"? However, it is hoped that the Courts will construe the article in the sense in which the legislature intends it to be understood.

The next important change is that made in Art. 118. It is said in the Statement of Objects and Reasons that the amendment "adopts theview taken by *Bhashyam Aiyangar* J. in *Chiruvolu* v. *Chiruvolu.*[3] There is a mistake here in the reference to the judge. Apparently reference is made to the view of *Sir Subrahmania Iyer* J. who was one of the referring Judges and also one of the judges who took part in deciding the question in the Full Bench. No separate judgments were delivered, but only one judgment was given. The change, of course, gives effect to the view taken by the Full Bench in the case.

We are by no means satisfied that the view taken by the Full Bench is a sound or correct one. We do not know what special magic there is in the case of adoption to take it out of the general rule, which is admitted by the learned judges themselves who decided this case, that one reversioner is not bound by the acts of another. *The case of Radha Mohan*[4] which went up to the Privy Council was a case of adoption and it was held therein by *Mahmood* and *Young* JJ. in the High Court that limitation

1. (1903) I.L.R. 31 C. 57, 30 I.A. 238.
2. (1905) I.L.R. 29 M. 305.
3. (1906) I.L.R. 29 M. 390 F.B.
4. (1899) I.L.R. 21 A. 460.

which would bar one reversioner would not bar another reversioner —see the judgment of *Mahmood* J. referred to in *Bagwanta* v. *Sukhi*.[1] The question of limitation was not raised before the Privy Council, but if the point was really arguable Mr. Mayne, whose astuteness as an advocate none could gainsay, would have taken it and argued it for the appellants. Apart from this change of doubtful merit there is no other change made by the Legislature in Art. 118. One would have expected that it was high time for the Legislature to put an end to the conflict of the decisions of the High Courts in India due, no doubt, partly to the confusion caused by the decisions of the Judicial Committee as to the scope of suits covered by Arts 118 and 119. The latest case upon the point neither tends to help the Courts of this country for arriving at a proper solution of the question nor contributes to enhance the respect which one ought to feel for decisions of the Highest Court of appeal for this country. We are sorry that the Legislature has not thought fit to declare authoritatively that these articles have no application to suits for possession but apply only to suits for declaration. There are many other points upon which a change or a legislative declaration may be beneficial if not necessary; but seeing the limited scope which the framers of the Bill have in view, it is useless to detail them at present.

---

## NOTES OF INDIAN CASES.

**Hakim Lal v. Mooshahar Sahu.**—I. L. R. 34 C. 999.—We welcome this decision as containing an elaborate discussion and a very lucid statement of the law in India as to alienations of property in fraud of creditors. Though the law on the subject has been embodied in a statutory form, the language of S. 53 of the Transfer of Property Act is far from happy. In the attempt to derive aid from English cases, Courts in India have been sometimes led astray by their inability to reconcile apparently conflicting decisions and oftener by overlooking the distinction between the cases on the Statutes of Elizabeth and those under the Bankruptcy law. And the difficulty of the subject has only been increased by a divergence of opinion as to whether S. 53 of the Transfer of Property Act was intended to, or did in fact, alter in any measure the law as enacted in the Elizabethan Statutes

1. (1899) I.L.R. 22 A. 33.

and interpreted by a long course of decisions—see *Bhagwant* v. *Kedari* ;[1] *Ishan Chunder* v. *Bishu Sirdar*.[2] The attempt of the Indian Legislature to squeeze into one section the provisions of *both* the Elizabethan statutes—the one intended to protect creditors and the other subsequent purchasers—has necessarily given rise to obscurity, if not even to some inconsistency, for though the two English statutes are to a great extent analogous and have similar aims, their application proceeds on somewhat different principles. The reproduction in the statutory form of the result of a large mass of English decisions as to the presumption of fraudulent intent has not been attended with very beneficial results; and the scope of the exception enacted in the third paragraph of S. 53—in favour of transferees in good faith and for consideration—and its relation to the presumption embodied in the second paragraph of the section have often been misunderstood.

The learned Judges (*Mookerjee* and *Holmwood* JJ.) clearly explain the true scope of the exception. It is always conceded that for the purpose of establishing the validity of a conveyance impeached as fraudulent on creditors, "it is not enough to prove that it was for consideration; it must *also* be proved that it was made in good faith." But the question is: "Under what circumstances may a transfer be said to have been made in good faith?" The second parapraph of S. 53 does not touch the point, so far as alienations *for consideration* are concerned; but the Courts in India very often drew from it the *negative* inference that a transfer for consideration is *as such* one made in good faith. It was assumed that the *only* test was whether the transaction was a mere cloak for retaining a benefit to the grantor, and even that test was very narrowly applied. It is now clearly shown that this test is "by no means exhaustive." The view of the law taken by the Madras High Court in the case of *Chidambaram Chettiar* v. *Sami Aiyar*[3] (which, we understand, is now under appeal before the Privy Council) is approved, and the learned Judges of the Calcutta High Court agree that under the law as enacted in S. 53 of the Transfer of Property Act, 'there may be cases in which a transfer although made for consideration may be voidable on the ground that it was

1. (1900) I.L.R. 25 Bom. 202. 2. (1897) I.L.R. 24 C. 825.
3. (1906) I.L.R. 30 M. 6.

made *mala fide.*" The dictum of *Lord Coke* in *Twyne's case*[1] that "a good consideration doth not suffice if it be not also *bona fide*" is thus affirmed to be the law in India. But in the practical application of this principle, there is one important distinction— which is frequently lost sight of—between cases where the transferee for consideration is himself a creditor, the consideration being the debt due to him, and cases where he is only a third party purchaser. What in the former case will be a mere *preference*, good except under the Bankruptcy law, may in the latter case be avoided by creditors under the Statute of Elizabeth. The reasons for the distinction are forcibly stated in the passage quoted from the American case of *Lockrain* v. *Rastan.*[2] But as the learned judges point out, "proof of a valid indebtedness does not necessarily disprove the existence of a fraudulent intent" and if the transaction is not really only by way of preference or "extends beyond the necessary purpose" of a mere preference, the transfer is fraudulent.

The problem in all these cases is, how best to protect four different and conflicting interests, viz,, the legal rights of the debtor as an *owner* of property, the claims of the general body of his creditors, the rights of the more vigilant among them who have taken steps to pay themselves, and, lastly, the claims of an honest and innocent purchaser. The application of even the most definite principles to such a situation cannot but be attended with great difficulty, but every attempt the better to define these principles must be welcomed as an aid to the better administration of justice.

The case also affirms the proposition that a claim to set aside an alienation on the ground that it is fraudulent and void as against the creditors can only be enforced in a suit either filed by all or on behalf of and for the benefit of all the creditors.

**Upendra Kumar Chakravarti** v. **Sham Lal Mandal.**—I. L. R. 34 C. 1020.—In this case the Calcutta High Court has refused to accept the view taken by a Full Bench of the Madras High Court in *Susya Pillai* v. *Aiyakkannu* [3] that Art. 175 (*c*) of the Limitation Act does not apply to *second* appeals. The Allahabad High Court has likewise declined to follow that

1. (1602) 1 Sm. L. C. 1. 2. (1899) 9 North Dakota, 434.
3. (1906) I. L. R. 29 M. 529.

ruling—*Madhuban Das* v. *Narain Das.*[1] The Madras Full Bench bases its opinion on what it considers to be " the *ratio decidendi* of the Full Bench decision in *Laksmi* v. *Sri Devi*,"[2] but except so far as it lays down the familiar rule of strict construction, the earlier decision can be no guide as to the scope of Art. 175 (*c*) as subsequently amended. The real question, therefore, is as to the effect of the reference in that article to S. 582 of the Code of Civil Procedure. If S. 587 of the Code expressly dealt with applications to bring on representatives of deceased parties, the non-mention of it in Art. 175 (*c*) will be a *casus omissus* which cannot be supplied by a Court which has only to interpret the law—*White* v. *Neaylon.*[3] But where it is possible to say that even in second appeals the application to bring on a representative is at least *in part* based on S. 582, it is certainly permissible to refer to the reason of the thing and the object of the amendment in deciding whether or not a case falls within Art. 175 (*c*).

Now that the Limitation Act is before the Legislature, the ambiguity will be removed, and the question is not therefore of much practical importance.

**Tribeni Sahu v. Bhagwat Bux.**—I.L.R. 34 C. 1037 (F.B.).—The diversity of opinion among the learned judges in this case is rather interesting. The Acting Chief Justice contented himself with answering the question as to the application of the 3rd paragraph of S. 546, C P.C. He was of opinion that an appellate Court could not act under that provision. Three other learned Judges (*Brett*, *Sharfuddin* and *Mitra* JJ.) were of opinion that an appellate Court had power to make an order under the 3rd clause of S. 546. *Woodroffe* J. was inclined to think that the clause applied only to Courts of First Instance, but he held that an appellate Court had power to make a similar order, whether the authority for it " be found in S. 546 read with S. 582 or in S. 545, or in the inherent jurisdiction of a Court of Appeal." *Mookerjee* J. was of opinion that the 3rd para. of S. 546 did not by itself apply to an appellate Court, but he held that a like order could be passed by an appellate Court under S. 545 and he also discussed the question of inherent powers.

We are disposed to agree with the view that the third para of S. 546 does not apply to an appellate Court. The draft Bill

1. (1907) I. L. R. 29 A. 585. 2. (1885) I. L. R. 9 M. 1.
3. (1886) 11 A. C. 171.

of the new Code slightly alters the language so as to make this clear. The order contemplated by this clause is not one staying execution generally, but only staying a sale of immovable property in execution of a decree for money. An appeal will lie (under S. 244, C.P.C.) against any order of a Court of First Instance under this clause, and on such appeal the appellate Court may make any order it thinks fit. But *Woodroffe* and *Mookerjee* JJ. hold that without any such appeal from an order of the Lower Court, the appellate Court can stay the sale of immovable property, if an appeal from the decree is pending before it. We find it difficult to accept this view.

A Court of Appeal may have inherent power to make an order to keep everything in *statu quo* till the disposal of the appeal. But an order of stay under S. 546, para 3, will not have such effect. The decree-holder will be free to arrest the judgment-debtor or attach and sell his movable property in execution of the decree. The provision made by the clause in question is not, therefore, meant to prevent the appeal becoming nugatory, and the general reasoning as to the expediency of a power to stay execution in the ends of justice will not, therefore, apply. The theory of inherent powers can make no distinction between immovable and movable property.

The same remarks apply to the argument that an order of this kind can be made by the appellate Court under S. 545, C.P.C. Staying the sale of immovable property is not staying execution of the decree. Nor is it really a case of the *larger* power comprehending the *smaller*, for the orders under the two sections are different in their nature and in their aim. (Cf. for instance S. 305, C P.C.)

As to *Cropper.* v. *Smith*[1] we may point out that, unlike Rules 16 and 17 of Order 58, R. S. C., the Civil Procedure Code does not give a general *concurrent* jurisdiction to both the original and the appellate Courts in the matter of staying execution of decrees.

**Shahzadi Begam.** v. **Secretary of State for India.**—I. L. R. 34 C. 1059.—In this case the Judicial Committee reversed the decision of the Calcutta High Court on a

1. (1883) L.R. 24 Ch. D. 305.

pure question of fact—one of disputed relationship turning on the genuineness of two documents. Incidentally the decision bears on one or two questions in the Law of Evidence. A pedigree filed in certain legal proceedings of 1804 had been produced at the trial and no objection had been taken to its admissibility. The High Court considered it inadmissible, having regard to the observations of the Privy Council in *Jagat Pal Singh.* v. *Jageshar Bhaksh Singh*,[1] but on appeal their Lordships held that it was "too late for the respondent to take an objection to the admissibility of a document which was received without objection at the trial." We wish it had been open to their Lordships to pronounce their opinion upon the general proposition put forward on behalf of the appellant that when a statement as to relationship was made by a stranger "by the authority of a member of a family," it was quite as admissible under S. 32 of the Evidence Act as if made by the member himself.

On another point their Lordships express a positive opinion. A deed of exchange purporting to have been executed in 1782 was sought to be proved by a certified copy said to have been obtained from the office of the District Judge of Dacca in 1851. The copy bore the signature of the Judge and the seal of the Court, but there was no evidence of the execution of the original deed nor anything to show when and where the original document was produced. Objection was taken, that as a *certified copy* it was not admissible under Ss. 74 and 79 of the Evidence Act. Their Lordships held that it was admissible in evidence; but it is not possible to gather from the judgment, under what section it was admitted. The High Court doubted the genuineness of the copy itself and did not express any opinion on the question of admissibility.

In the circumstances of the case, there are only two Clauses —Clauses (*c*) and (*e*) of S. 65 of the Evidence Act—under one or other of which the copy could have been admitted. In either view, their Lordships' conclusion on the point which appears to have been strongly pressed before them is of considerable importance.

There are serious difficulties in bringing the case under Clause (*c*). The first question would be whether a case had been laid

1. (1902) I.L.R. 25 A. 143; 30 I. A. 27.

for the reception of secondary evidence—*LuchmanSingh* v. *Puna*.[1] The non-production of the original must be accounted for—*Krishna Kishori* v. *Kishori Lal Roy*,[2] *Appathura Pattar* v. *Gopala Panikkar* [3]—unless as in *Ishri Prasad* v. *Lalli Jos Kunwar* [4] the Court is willing to take judicial notice of the fact that the document has been lost or destroyed. It must also be shown that the document of which secondary evidence is proposed to be given, *did exist* at one time, or in other words there must be some proof of the execution of the original. There was none such in the present case and the procedure of their Lordships can be supported only by assuming that they meant to affirm the wide construction placed upon S. 90 of the Evidence Act in *Khetter Chunder Mookerjee* v. *Khetter Pal* [5] which was cited before the Privy Council. This decision has been followed by the Allahabad High Court (*Ishri Prasad* v. *Lalli Jos Kunwar* supra)[4] though the Madras High Court has left the question open (*Appathura Pattar* v. *Gopala Panikkar*, supra).[3] But even on this view of S. 90, it would seem necessary to shew that the original document has been lost and that *it* (not the *copy*) was last heard of in proper custody.

If, on the other hand, their Lordships are to be understood as having admitted the certified copy under Cl. (*e*) of S. 65,—in which case the non-production of the original need not be accounted for and the presumption of genuineness laid down in S. 79 would apply—the decision would give a very extended scope to S. 74. The expression 'public documents' is 'inadequate and misleading.' 'Public' may mean 'open to all,' or 'capable of being known or observed by all,' or 'having an interest for persons in general' or 'made or done by an officer of Government.' The scope of the rule will differ according to the sense in which the term 'public' is to be understood. (See Wigmore on Evidence, S. 1630.) The Indian Legislature has therefore attempted to define 'public documents' in S. 74 of the Evidence Act, but that definition is by no means free from difficulty and very divergent views have prevailed in the Indian Courts with reference to its scope. But no case has gone the

1. (1889) I. L. R. 16 C. 753 (P. C.)
2. (1887) I. L. R. 14 C. 486 (P. C.)
3. (1901) I. L. R. 25 M. 674.
4. (1900) I. L. R. 22 A. 294.
5. (1880) I. L. R. 5 C. 886.

length of holding that a document becomes a 'public' document merely by being filed in a Court (see *Hureehur* v. *Churn Majhee*;[1] *Shazada Mahomed* v. *Daniel Wedgeberry*;[2] see also *Ponnammal* v. *Sundaram Pillai*[3]) and we cannot assume that the Judicial Committee meant to affirm such a view.

**Jamna Prasad v. Ram Partab.**—I. L. R. 29 A. 667.—In this case, the learned Judges have refused to follow the decision of the Madras High Court in *Vythinatha Ayyar* v. *Yeggia Narayana*.[4] The question is by no means an easy one, and we cannot help deploring that in recent years the decisions of the Court of Final Appeal from India have frequently shown a tendency to confound ideas which though connected with each other are not really identical. The 'partibility' of property, its 'jointness,' 'ancestral character' and the existence of a 'right by birth' in it are, no doubt, closely connected ideas, but they are, nevertheless, distinct conceptions. Property may be 'joint' without being 'ancestral'; it may be, 'partible' without being 'ancestral'; it may be 'partible' or 'joint' without the existence therein of a 'right by birth;' in a general sense it may also be 'ancestral,' without other persons having a right by birth in it. The looseness of conception underlying some of the decisions leads to further difficulties and conflict of judicial opinion. As early as in the *Sivagiri case*[5], we may notice the ambiguous use of the term 'ancestral.' On the one hand, everything that is not 'self-acquired' is classed as 'ancestral'; on the other hand 'ancestral' is identified with what the Mitakshara describes as '*Apratibandha*.' Property inherited from a maternal grandfather may not be self-acquired, it may be in a sense 'ancestral,' but nobody has gone the length of classing it as '*Apratibandha Daya*' or "unobstructed heritage." As pointed out in the decision under notice, right by birth and the consequent right to demand partition are postulated by the Mitakshara only in respect of what it groups under the head of '*Apratibandha Daya*.' The theory of survivorship is nowhere expressly adverted to by the Mitakshara; survivorship is not really an incident of any kind of property, but

1. (1874) 22 W. R. 355
2. (1873) 10 B. L. R. App. 31, criticised by Field, 6th Edn., p. 240 and Amir Ali, 4th Edn. p 410.
3. (1900) I. L. R. 23 M. 499.
4. (1903) I. L. R, 27 M. 382.
5. (1879) I. L. R. 3 M. 370, (1882) I.L.R. 6 M. 1 (P. C.)

merely the result of the corporate constitution of the joint family. It may exist in other cases by force of the language of grants or (according to the decision in the *Jaggampet case*)[1] by inheritance, under particular circumstances; but this certainly cannot have the effect of converting property so held into 'unobstructed heritage.' It is no good trying to evolve this right of partition from the combined effect of the decisions in the *Jaggampet case*[1] and in *Jageswar Narain Deo* v. *Ramchandra Dutt.*[2] Were it necessary to do so, one may even feel tempted to fall back upon the famous dictum of *Lord Halsbury* to escape the extremes to which such ratiocination must lead. If "a case is only an authority for what it decides" and not "for a proposition that may seem to follow logically from it"—(*Quinn* v. *Leatham*[3]) extension by way of reasoning is much less permissible with reference to what may seem to follow from the combined effect of *two* cases; for if it is anywhere true that "law is not logical," it is in India.

Since the above was written, we have receieved Part IV of the Bombay Law Reporter (Vol. X) one of the judgments reported in which contains a forcible and lucid discussion by *Beaman* J. of the import of the expression, 'joint property,' 'joint family property' and 'ancestral joint family property.'—*Kursandas Dharamsey* v. *Ganga Bai* p. 184. See also *Laidar Narandas* v. *Motibai*, *ibid*, p. 175. We shall comment upon these cases later on.

## SUMMARY OF ENGLISH CASES.

*In re* **Roby—Howlett** *v.* **Newington.** [1908] 1 Ch. 71 (C. A.)

*Will—Executor—Gift of residue—Express trust—Advancement to some children—Partial intestacy—Next of kin—Hotchpot.*

Where there happens an intestacy as to part only of a testator's estate to which part the executors are not beneficially entitled under the will and the part has to be distributed among the next of kin among whom are the daughters of the testator to whom he had made advances during his lifetime: *Held*, in accordance with a rule established for two centuries, that "in a case of partial intestacy as to the beneficial interest the doctrine of hotchpot does not apply" and that, therefore, the daughters of the testator were entitled to equal distribution of the undisposed of residue along with the rest of the next of kin without bringing into hotchpot the advances they had received.

1. (1902) I.L.R. 25 M. 678 (P. C.) 2. (1896) I.L.R. 23 C. 670 (P. C.)
3. (1901) A. C. 495.

**Normandy v. Ind Cooper and Co., Ltd.** [1908] 1 Ch. 84.

*Company—Shareholders—General Meeting—New and important resolutions—Notice—Sufficiency of—" General nature of business" at the meeting—Non-disclosure of—Agreement by Directors—Ultra vires—Action by shareholder—Right to sue.*

Where in a Company which was doing a large business and incurring enormous liabilities and whose pecuniary circumstances were not good, the notice issued to the shareholders, of a proposed meeting, simply declared that new regulations (Articles of the Association) were to be proposed, and if necessary approved and adopted in place of the old ones, and that copies of the proposed regulations could be had at the premises of the office or on application, while the purposes of the new regulations actually were (1) to enable the Directors to grant a retiring pension to any managing Director, (2) to confirm an agreement made by the Directors with a retiring managing Director to pay him a retiring pension of a large amount, disproportionate to the benefit he had conferred on the Company; (3) to increase the pay of each of the Directors by one half besides allowing them travelling, hotel and other expenses; (4) to appoint three Directors for life; (5) to exempt Directors from liability for loss; and (6) to enable them to borrow a further sum of £ 1,50,000 :—

*Held* in an action by a shareholder, that (1) though the resolution adopting these new regulations was passed at a General Meeting of the Shareholders and confirmed at a second Extraordinary Meeting, the resolution was invalid, as the notice given to the shareholders was vague and did not sufficiently describe the " general nature " of the business to be transacted, which was really one affecting greatly the pecuniary circumstances of the Company; (2) though "it must be competent to the Company to make a bargain with one of the Directors either for a reward to him for his past or future services, "..... " the Directors were not competent to make the agreement on behalf of the Company without the authority of a General Meeting"; (3) the Directors who were authorised by the original Articles of Association to grant an allowance or pension to a " person in the employment of the Company " could not consider any one of themselves to fulfil such a description as they were in no sense employes; (4) the plaintiff, a shareholder, had no right of suit in respect of these irregularities;

and that (5) plaintiff's remedy was only by way of appeal to the shareholders of the Company who were entitled from time to time to alter resolutions passed and were by the Articles of Association bound by the same. "It is dangerous and wrong to interfere with their (shareholders') liberty of action."

Per *Curiam*—(1) "If the Directors of a Company purporting to act on the authority of resolutions irregularly passed were threatening to part with the property of the Company in such manner as fairly to justify the charge of irreparable injury, I am not satisfied that the Court would not interfere by injunction to prevent that injury, notwithstanding the possibility or even probability that the Company would, in General Meeting, subsequently uphold the Directors' conduct."

(2) "The Court has never, except in a case of fraud, interfered to prevent a majority from securing benefit to themselves by means of their preponderance of voting power."

---

*In re* **Waidanis—Rivers** *v.* **Waidanis.** [1908] 1 Ch. 123.

*Will—Executors—Not named but only descriptive and capable of being ascertained.*

If *A* directs in his will that the executors of his father's will shall also be his executors, then on the death of the surviving executor of his father's will, the survivor's executors who had acted in the trusts of the father's will are the executors of *A's* will.

---

*In re* **Sidney—Gingeston** *v.* **Sidney.** [1908] 1 Ch. 126.

*Charity—Bequest for charitable uses or Emigration uses—Indefiniteness—Void bequest.*

A bequest "for such charitable uses or for such emigration uses or partly for such charitable uses and partly for such emigration uses as they (the trustees) shall in their absolute and uncontrolled discretion think fit" is void as "it is vague, indefinite and not charitable."

Per *Curiam*—"In *Hunter* v. *Attorney-General*[1] Lord *Halsbury* says: 'It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made by the will so that the

1. (1899) A. C 309, 315, 323.

whole might be applied for either purpose, 'the whole bequest is void' and Lord *Davey* says 'where bequest includes purposes which may or may not be charitable (such as 'undertakings of public utility') and a discretion is vested in the trustees, the whole gift fails for uncertainty."

Per *Curiam*—"Emigration is not confined to the poor, nor do I think that emigration is of such general public utility or for the benefit of the whole community that a gift to aid it is necessarily a charity."

---

### *In re* Spencer Cooper—Poe *v.* Spencer Cooper.

[1908] 1 Ch. 130.

*Will—Legacies—Direction to pay out of a mixed fund—Rateable payment—Estate Duty—Direction to pay testamentary expenses.*

Legacies directed "to be paid out of a mixed fund" are "according to the principle enunciated in *Roberts* v. *Walker*[1] and *Allan* v. *Gott*[2] payable *pro rata* out of the real and personal estate."

"The primary burden on devisees of land (whether devised in trust for sale or not) in respect of estate duty on the land is not removed by a direction to pay testamentary expenses."

---

### *In re* Discoveries Finance Corporation, Ltd.

[1908] 1. Ch. 141.

*Company—Liquidation—Transfer of shares—Unfair and voidable transfer—List of contributories—Right of liquidator to place transferor on the list in the place of the transferee.*

Where before the winding up of a Company a transfer of shares accepted by the Company was made by a shareholder *A* to *B*, to whom *A* stood in the position of *loco parentis*, who had no independent advice and on whom *A* exercised undue influence, in respect of the transfer, the circumstances of the transfer being such as to give *B* an equity to avoid the transfer, the transfer also not being *bona-fide* and real, and being a losing concern to *B*:—*Held*, that for the foregoing reasons the liquidator was entitled, though *B* had once been accepted as the transferee, to remove *B*

1. (1830) 1 Russ. and My. 752. 2. (1872) L. R. 7 Ch. Ap. Cas. 439.

who was unable to pay the unpaid calls and place *A* in the list of contributories.

Whether the transfer was out-and-out is not the only test of its validity. The *bona-fides* and the non-fictitious nature of the transfer are also the criterion.

[*Lund's case*,[1] *DePass's case*,[2] *Castello's case*,[3] and *Budd's case*[4] followed.]

---

**Johnson v. Pickering.** [1908] 1 K. B. 1 (C. A).

*Writ fi. fa.—Seizure—S.*12, *Judgment Act* (1 *and* 2 *Vict. C.* 110)—*Death of the judgment-debtor before seizure.*

From the mere fact that the judgment-debtor places in a drawer seized by the Sheriff, some money which he subsequently got, it does not become property "seized."

Under S. 12 of the Judgments Act, no right in the money of the judgment-debtor is created in favour of the execution-creditor until actual seizure.

The words "money belonging to the person against whose effects such writ of *fieri facias* shall be sued out" in that section do not include money which was the judgment-debtor's before his death and has since vested in his personal representatives.

[Judgment of *Lawrance* J. [5] reversed.]

---

**Macbeth v. North and South Wales Bank.**

[1908] 1 K. B. 13 (C. A.)

*Cheque—Conversion—Payee—" Fictitious person "—Intention of the drawer—S.* 7, *Bills of Exchange Act* (45 *and* 46 *Vict. C.* 61.)

The action was brought against the defendant bank for the conversion of a cheque. One White, by falsely representing to the plaintiff and another that he had agreed to purchase from a man named Kerr certain shares in a Company (as a matter of fact Kerr owned no shares in the Company) and that he had arranged to re-sell the shares at a profit, induced the plaintiff to finance the transaction by drawing a cheque on his bank payable to Kerr or

1. (1859) 27 Beav. 465.
2. (1859) 4 De G. and J. 544.
3. (1860) 2. D. F. and J. 802.
4. (1861) 3 D. F. and J. 297 ; 17 M. L. J. 402.
5. (1907) 2 K. B. 437.

order. Instead of using the cheque in the purchase of the shares as he was required by the plaintiff to do, White forged Kerr's endorsement and paid the cheque into his own account with the defendant bank who collected the money from the plaintiff's bank.

*Held.*—(1) Though the cheque had been drawn for a joint purpose, as it was the plaintiff's cheque which was to be applied in a specific way, the plaintiff was the only person entitled to bring the action for a wrongful dealing with the cheque.

(2) As the payee designated in the bill was a real person intended by the drawer to receive the payment, the payee was not a 'fictitious person' within the meaning of S. 7 of the Bills of Exchange Act.

(3) The term 'fictitious' is a relative term. It means "fictitious" by the pretence of some person who is a party to the instrument. Even a real person might be a fictitious payee within the meaning of the section if he was not intended by the drawer to receive payment on the bill.

[*Bank of England* v. *Vagliano Brothers*[1] distinguished; Judgment of *Bray* J. [2] affirmed.]

---

**Westgate *v.* Crewe.** [1908] 1 K. B. 24.

*Costs—Appeal—Discretion in refusing—Neglect to give information to plaintiff.*

An appeal lies from an order as to costs made by a County Court Judge when there are no materials upon which a discretion could be exercised or if he exercised his discretion upon grounds not open to him.

Where the Judge finds that the plaintiff has sued the wrong party, it is not a ground for depriving the defendant of his costs that he neglected to give information which would have enabled the plaintiff to ascertain as to who was the proper party to be sued just as it is no ground that "he relied upon a defence which he was entitled by law to set up such as the Statute of Limitations or the Gaming Acts, or that he refused to submit to the Judge as an arbitrator to say what should be done in the matter and insisted upon having the case tried according to law."

---

1. (1907) 2 K. B. 439. 2. (1891) A. C. 107.
3. (1906) 2 K. B. 718.

**Richardson v. Graham.** [1908] 1 K. B. 39 (C. A.)

*Right to ancient light—Landlord and tenant—Transfer of the reversion to the owner of the servient tenement—Extinguishment.*

Where a house had, at the time of the granting of a lease, attached to it a right to ancient light, such right is not extinguished by the landlord subsequently conveying the fee simple to the owner of the servient tenement.

To extinguish the right there must be both unity of seisin and unity of enjoyment.

The principle is "the landlord, having unquestionably given by a legal act the right to light to the plaintiffs, cannot give by a legal act to another person something which is absolutely inconsistent with that right which he has already granted to the plaintiffs."

---

**Mansfield v. Relf.** [1908] 1 K. B. 71 (C. A.)

*Landlord and tenant—Covenant by lessor to pay land-tax—Effect of improvements by tenant.*

In construing covenants contained in leases by which the landlord covenants to pay the land-tax or by which the tenant covenants to pay all rates and taxes with the exception of land-tax, the convenant must be treated as referring only to that portion of the land-tax which is properly payable by the landlord having regard to the annual value which the land produced to him. Where the tenant has effected improvements the lessor has to pay tax on the original value and the lessee on the improved value of which he alone reaps the benefit.

---

**Lenny & Sons v. Callingham & Thompson.**

[1908] 1 K. B. 79 (C. A.)

*Practice—Receiver—Landlord and tenant—Suit to recover possession—Licensed premises—Subject-matter of litigation.*

In an action by a lessor to recover possession of an hotel as on a forfeiture where the lessee had covenanted to keep the hotel continuously open and not to do anything whereby the license might be endangered, the Court may validly appoint a receiver of the license and of the rents and profits and authorise him to keep

the house continuously open as an hotel and to do all the acts necessary for that purpose and for the purpose of preserving the license from forfeiture. In a case like the present where the lease is of an hotel with covenants such as given above, the plaintiff does show *prima facie* title to an interest and a substantial interest in the licenses which have no useful or practical existence apart from the business. To the extent, therefore, to keep the business alive in order to preserve and effectuate the licenses, a manager may be appointed to carry out that intention of the parties.

---

**Dewar *v.* Goodman.** [1908] 1 K. B. 94 (C. A.)

*Landlord and tenant—Covenant by under-lessor to perform covenants of the head lease—Not in respect of the demised premises—Collateral.*

A lease of a certain land contained a covenant on the part of the lessee to keep in repair all buildings erected on the land. Houses to the number of 211 were erected on the land. Defendant's assignor, the lessee under the original lease, sub-demised two of the houses to the plaintiff's assignor, the under-lease containing a covenant by the latter to keep the two houses in repair and also a covenant by the former to perform the covenants in the head lease. The plaintiff was ejected by the head landlord for a breach of the covenant in the head lease to repair all the houses including the two houses forming the subject-matter of the under-lease.

*Held*—(i) The covenant to perform the covenants in the head lease not being in respect of the demised premises did not run with the land. A covenant to do an act not in respect of the demised premises, but which will protect from forfeiture the estate of the lessee in the demised premises, is not, on that latter ground, a covenant running with the land.

*Held* also by *Buckley* L. J.—The landlord having entered by reason of the failure to do an act which as to part ought, as between the plaintiff and the defendant, to have been done by the plaintiff, and as to part by the defendant, the plaintiff had no cause of action against the defendant.

[Judgment[1] of *Jelf* J. affirmed.]

---

1. (1907) 1 K. B. 612.

**Gingell, Son & Foskett, Limited *v.* Stepney Borough Council.** [1908] I K. B 115 (C.A.)

*Market—Dedication of highway—Long user—Presumption of legal origin—Qualified dedication.*

Where a market has been held over a highway for years either under the order of, or without objection by, a highway authority having the right and duty to object if such user were wrongful, one ought to attribute to the user, if possible, a legal origin.

If you find a dedication by the owner of a soil lying "juxta" the centre of a market, it is a fair presumption that he dedicated his land subject to the market franchise which he must be taken to have known to exist.

Even in a case where the dedication is not by presumption but by statute, in the absence of clear words to the contrary in the statute, it must be taken that it was dedicated to a public who knew of, and were subject to, an existing market franchise.

[Judgment[1] of *Swifen Eady* J. affirmed.]

---

**Whitehead *v.* Palmer.** [1908] I K. B. 151.

*Lease—Death of the lessor—Administrator 'ad colligenda bona' with power to sell—Liability for rent.*

Where a person is appointed administrator *ad colligenda bona* with power to sell a lease belonging to a deceased person, that lease is vested in him during the period of time for which the grant is made. But he does not become liable for rent if he does not enter on the premises.

If he does enter, he becomes liable not only for the rent which he has actually received but what he might have received if he had used due diligence, or, as it is sometimes expressed, he is liable for the yearly value which the premises might have yielded. But because a quarter's rent falls due when he is in possession he does not become liable for the whole of that; he is liable only for the proportion of the rent due in respect of the period during which he was actually in possession. While an executor's title is derived from the deceased, an administrator's is derived from the Court

1. (1906) 2 K. B. 468.

which makes the grant; consequently the administrator is liable only from the date of the order apponting him administrator.

---

**Davies v. Mayor of Bromley.** [1908] I K. B 170. (C.A.)

*Local sanitary authority—Refusal to sanction plans—Malice—No action—Mandamus.*

No action will lie against a local sanitary authority for their refusal to sanction the execution of certain building and drainage works according to plans deposited with them, even if there is evidence to show that the individual members of the authority were actuated by bitterness or some other indirect motive.

Where, however, the Court can see from the facts that, although the local authority has made a pretence of exercising its power, it has, nevertheless, in truth and in fact, never addressed its mind to the question before it, a mandamus to hear and determine the matter might be obtained from the King's Bench Division.

---

**Mansell v. Griffin.** [1908] I. K. B. 160.

*Master & pupil — Right to inflict corporal punishment—Assistant Master—School regulations.*

No action will lie against an Assistant Master in a Public Elementary School for inflicting corporal punishment on a pupil provided it is moderate and was not dictated by any bad motive and it is such as is usual in the school and such as the parent of the child might expect that the child would receive if it did wrong. The ordinary authority to inflict moderate corporal punishment which may be presumed to be delegated by the parent extends not to the head teacher only but also to the responsible teachers who have charge of classes, unless there were regulations or there was a known custom confining the administration of corporal punishment to the Head-Master of the school and those regulations or custom were known to the parents from which it could be inferred that that authority was delegated only to the Head-Master Consequently the mere fact that there were regulations in the school forbidding Assistant Masters from inflicting corporal punishment would not render them *ipso facto* liable in an action for assault, by a pupil.

**Lister** *v.* **Hoosor.** [1908] I. K. B. 174 (C. A.)

*Bankruptcy— Voluntary settlement declared void—Debt due to the Bank—No set off.*

Where a settlement on a wife had been declared void as against the trustee in bankruptcy of the husband and the trustee sued the wife to recover the money paid to her under the avoided settlement:—Held (*Fletcher Moulton* L. J. dissenting) the wife cannot set off a sum due to her from her husband at the date of the bankruptcy because at the date of the bankruptcy there was no debt due from the wife to the husband, the debt having arisen only subsequently and in the course of the management of the estate by the trustee exercising his right to avoid the settlement.

*Fletcher Moulton* L. J.—As the trustee is not bound to collect first such assets as consist of unquestioned debts and do not depend upon the exercise of rights specially given to a trustee in bankruptcy to claim property which under ordinary circumstances would not belong to the bankrupt, and as no formal avoidance is necessary before an action could be brought for the money, the money is in the same position as if it had all along belonged to the estate and therefore the subject of set off.

---

**Lewis** *v.* **Lewis.** [1908] P. 1.

*Will—Two pieces of paper—No mechanical fastening—Held together some way at the time of execution.*

Where it was established by parol evidence that two pieces of paper propounded as the will of a deceased person were held together by the testator's finger and thumb but without any mechanical fastening at the time he put them before the attesting witnesses as his will and acknowledged in their presence his signature to the document as his will :

*Held* :—The will was duly executed.

---

**Norman** *v.* **Norman.** [1908] P. 1.

*Suit for judicial separation owing to cruelty—Covenant not to revive proceedings in respect of cruelty—Subsequent adultery—Suit for divorce—Previous cruelty pleadable.*

A covenant by a wife in a deed of separation to the effect that all proceedings in a suit by her for judicial separation which

was then pending should be withdrawn and that she was not to revive the same in any manner whatever, does not preclude her from suing for her divorce on the ground of the husband's subsequent adultery coupled with the previous cruelty.

**Guardian of the Poor of Westham Union**

*v.*

**Guardian of the Poor of Edmonton Union.**

[1908] A. C. p. 1.

*Settlement—Division of Parish—No destruction—Local Government Act*, 1894 (56 and 57 *Vict. C.* 73)—'*Stare decisis.*'

One Forest, a pauper, acquired a settlement in Tottenham Parish. Subsequently by operation of the Local Government Act, the Parish of Tottenham came to be divided into two parishes, Woodgreen and Tottenham; but the Union remained the same Edmonton Union. Forest was found chargeable in Westham Union and the Guardians thereupon claimed that the Parish of Woodgreen in the Union of Edmonton was the place of his last legal settlement and that therefore he was removeable there. The Courts below felt constrained by the authority of *Tipton's case*, [1] and the cases following it, to hold that the division of the old Parish had the effect of destroying all the settlements theretofore acquired in the whole of the old Parish.

*Held*, on appeal, that it had not such effect, and that *Tipton's case* [1] was wrongly decided. Referring to the principle of *stare decisis*, Lord *Loreburn*, L. C., says: "Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them." Much to the same effect also the *Earl of Halsbury*: "But all these things must be governed, I think, by a reference to the subject-matter with which we are dealing; and certainly if anybody could suppose that a principle of law was to be extracted out of the different Poor Law Statutes which have been enacted, he must have a very acute sense to discover a

1. 3. Q. B., 215.

principle. From first to last, the Poor La
of continual alteration."

---

**Isidore Clifford v. Timms.** [1908

*Dentist—Professional misconduct—Disparag other members of the Profession.*

It is gross professional misconduct on the part advertise that among other advantages, the instru Company of which he was the Director were always ste before use and that a trained lady nurse was always present a operations so as to prevent any possibility of scandal between the operator and the lady patients. [Decision in (1907) 2 Ch. 236 affirmed on this ground.]

---

**Nelson Line, Ltd. v. James Nelson and Sons.**
[1908] A. C. p. 16.

*Carriers—Ambiguous contract—Liability for negligence unaffected.*

The plaintiffs shipped a cargo of meat on the defendants' vessel under an agreement of June 18, 1904. The cargo was lost by reason of the vessel's unseaworthiness, which was due to the defendants' negligence, and the sole question was whether or not they were freed from liability by certain words in the agreement. It was not possible to say what exactly the parties intended to stipulate. Under those circumstances their Lordships held in the words of *Lord Loreburn*:—" The law imposes on ship-owners a duty to provide a sea-worthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different. As *Lord Macnaughten* said in *Elderslie Steamship Company* v. *Borthwick* [1]—' an ambiguous document is no protection.' That is the ground on which I rest my opinion." His Lordship also observed: " I cannot agree in what I think was the contention that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the

1. (1905) A. C. 93 at p. 96.

ued.' I know of only one standard of con-
e words have acquired a special conven-
ly: What do the words mean on a fair reading
the whole document." Referring to the
rcial men, the *Earl of Halsbury* observed :" Lord
o say that contest between commercial men and
t the commercial men wished to write it short
always wished to write it long ; but a mixture of
nders the whole thing unintelligible."

Decision of the Court of Appeal [1] affirmed on the above ground.

---

**West Leigh Colliery Company, Limited**

*v.*

**Tunnicliffe and Hampson, Limited.**

[1908] A. C. 27.

*Surface owner—Damages for subsidence—Depreciation in market value due to fear of future subsidence*:—

The action was brought by a surface owner to recover damages for injury by subsidence owing to the removal of minerals from under his property. The Court of Appeal allowed him a large sum as compensation for depreciation in the market value of the property brought about by the apprehension of future injury by subsidence. *Held*, on appeal, that it could not be taken into account in assessing the damages recoverable in the action. The reasoning of their Lordships may be stated in the following words from the leading judgment of *Lord Macnaughten.*

"It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner 'may recover for that damage' as *Lord Halsbury* says in the *Darley Main Colliery case* [2] 'as and when it occurs.' The damage, not the withdrawal of support, is the cause of action. And so the Statute of Limitations is no bar, however long it may be since the removal was completed, nor is it any answer to the surface owner's claim to say that he has

1. (1907) 1 K. B. 769.

2. 11 A. C. 127 at 135.

already brought one or more actions
once, and again for other damage resu
tion. If this be so, it seems to foll
value of the surface owner's property bro
hension of future damage gives no cause o
if depreciation caused by apprehension of fu
furnish a cause of action by itself, because
wrong, though the damage may be very grea
to see how the missing element can be supplied by p
the claim in respect of depreciation tacked on to a c
in respect of a wrong admittedly actionable."

---

**Sir James Laing and Sons, Limited v. Barclay Curle & Co.** [1908] A. C. p. 35.

*Contract for sale of ships to be built—Passing of property—Sale of Goods Act*, 1893 (56 *and* 57 *Vict. C.* 71), *Ss.* 16, 18, 62.

The respondents' firm agreed to build two ships for an Italian firm according to certain specifications and under the superintendence of an expert to be appointed by the Italian firm. The purchase-money was to be payable by instalments at certain specified stages of construction. The delivery was to be considered completed only after the ships had passed certain trials and after all the conditions as to speed, &c., were fulfilled. Till delivery the ships were to be at the risk of the builders. Before the ships were fully constructed, but after several of the instalments had been paid, the appellants sought to attach the ship for a debt due to them from the Italian firm.

*Held*, that on a true construction of the contract there was no intention on the part of the builders to make delivery or part with the property until the vessel was completed and consequently the ships could not be attached. "The fact that the ship was to be paid for by instalments and that there was a power of inspection on the part of the purchasers, may be marks pointing to the property passing, but it is not conclusive. The contract was for a completed ship, and the risk lay upon the builders until delivery and there was no intention to make delivery or part with the property until the vessel was completed."

*Lord Loreburn* L. C :— It is only "in aid and supplement of construction, the Statute (Sale of Goods Act). supplies certain

not come into operation according as

---

**her v. Tranouth and another.**

908] A. C. p. 60.

*tion Act* (*R. S. O.* 1897 *C.* 126) *S.* 87—*Un-nce void against registered conveyance—Limita-*

1891, the respondent Rachel Tranouth, being the owner fee simple of the land in suit and about to marry, instructed one Sootheran, a conveyancer to prepare the papers necessary to vest the ownership in herself and her intended husband. Sootheran prepared a conveyance from Rachel to himself and a separate conveyance by himself to the respondent. He registered the conveyance to himself. But he failed to register the re-conveyance and deceived his clients by producing a forged certificate of registration. In 1895, Sootheran mortgaged the property to the appellants. The present action was by the mortgagees upon their mortgage. The Ontario Registration Act makes every instrument affecting lands void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless the instrument is registered. But the respondents had been in possession of the property for over the statutory period after the re-conveyance. Under these circumstances, the Supreme Court of Canada held that the mortgagee's claim was barred, the possession of the respondents having been adverse to the appellants and their predecessor in title from the date of the re-conveyance. Their Lordships thought otherwise. As between Sootheran and the respondents, the deed of re-conveyance was perfectly valid, and consequently before the date of Sootheran's mortgage to the appellants no action could have been brought to secure the land. The Statute of Limitations, their Lordships thought, did not therefore, afford any defence to the respondents.

---

## JOTTINGS AND CUTTINGS.

*The Legal Effect of Wrongful Dismissal.*—If a servant engages not to compete in business with his master, or serve a competitor in a certain district after the termination of the contract of service, is he released from this promise by a wrongful dismissal?

It may be said that the damages which
sal compensate him for the loss of the sa
wise have earned, and, therefore, that
part of the bargain should not be kept s
done after the service has come to an end.
is the authority of *Proctor* v. *Sargent*, a case
by the Court of Common Pleas on demurrer.
there is the principle, clearly set out by Lord Jus
*The Boston Deep-sea Fishing Company* v. *Ansell* that th
ful repudiation of the contract by one party operates as a dete
nation of the contract from the time when the injured party
elects to treat the wrongful act as a breach of contract, so that the election emancipates the latter from continuing to perform it. The application of the latter principle will probably commend itself to business people as being more consistent with fair dealing than to allow the party who has wrongfully put an end to the performance of his part of the contract to insist on its observance by the other party. It has now met with the approval of the Court of Appeal in *The General Bill-posting Company* v. *Atkinson*. The Court treated as mere *dictum* the opinion of the Court of Common Pleas in *Proctor* v. *Sargent* that an action can be maintained against a servant who has been wrongfully dismissed for a subsequent breach of covenant not to compete with his master. The question in that case was merely as to the sufficiency of the declaration, and the decision was, of course, not binding on the Court of Appeal, which very properly asserted the more modern view.

***

*Public Entertainments and False Pretences.*—At Greenwich Police Court, on February 7, before Mr. Hutton, an ingenious attempt was made to extend the application of the Statute Law as to false pretences. W. F. Cooper was charged with unlawfully and knowingly, by false pretences, attempting to obtain admission to the gallery of a theatre to witness the performance, with intent to defraud the proprietor of the amount of the charge for admission. The alleged false pretence consisted in the presentation of a spurious metal check made in imitation of those in use at the theatre, but bearing different lettering. The Magistrate ruled that the admission to the theatre, though it might be money's worth, was not a chattel, money, or valuable security, and that,

not have been in law any statutory tokens is a cheat of common law if eby obtained ; but there seems to be no indictable to obtain by a cheat such a n to a place of entertainment.

* * *

*tury of Crime.*—In the new volume of Criminal are a number of tables that afford a survey of the ments of crime during the past fifty years. To the familiar question—Is crime increasing ?—they enable a pleasing answer to be returned. In 1857 the number of persons tried for indictable offences was 54,667; in 1906 the number was 59,079. This, it is true, is an increase of 4,380 ; but the population has increased from nineteen millions to thirty-five millions in the same period, and, if this enormous increase in the population is taken into account, the decrease in indictable offences is 40 per cent. Mr. Farrant, who contributes the introduction, might have brought out this gratifying fact even more clearly than he does. (Many people, by the way, will regret that Sir John Macdonell, eminent alike as a jurist and a statistician, has ceased to write the Introduction to the Criminal Statistics). The number of indictable effences reported to the Police in 1906 was actually less than in 1857, notwithstanding the fact that the population has almost doubled in size. An examination of the tables of non-indictable offences yields, it is true, less satisfactory results. The number of such offences rose from 329,019 in 1857 to 700,978 in 1906. But it has to be remembered that a very large proportion of these now indictable offences are merely breaches of municipal law. For instance, there were 53,399 offences against the Education Acts in 1906, while there were, of course, none in 1857. The great growth of vehicular traffic has also a large influence upon the figures ; offences against police regulations, which numbered only 38,633 in 1857, were 132,504 in 1906. In the more serious non-indictable offences, such as assaults, cruelty to children, malicious damage and unlawful possession, there has been a considerable decrease. According to Mr. Farrant these criminal, non-indictable offences were some 30,000 less in 1906 than in 1857. There is, then, good ground for believing that the variou forces that make for righteousness are gaining ground in oui

midst. At any rate, the pessimist has
that the world, as reflected in these st
worse.

***

"*Stagnation in the Business of the Ba*
*Larsen v. Sylvester* & *Co.*, which was dow
Court of Appeal on Monday, was called on
a junior counsel for the respondents, said he ha
a joint message from Mr. *Hamilton* K. C. and Mr.
K. C., who were briefed respectively, for the appellant and
respondents. Both counsel were engaged before the Privy
Council, and they had requested him to apply to their Lordships that this case might stand out of the list till next Monday. Lord Justice *Vaughan Williams*: "I do not think this is a convenient principle to act on. The whole bar is conducted on the basis that in cases of importance you must have a leader and a junior. Hence there is no inequality. Neither leader is able to come. Why should we not hear the case in its turn?" Mr. *Jenkins* K. C. (interposing) said he appeared in the next case in the list and had been waiting for three days for it to come on. He was ready to proceed at once. Lord Justice *Vaughan Williams* (to Mr. *Jenkins*): "As you have been kept waiting a long time, we will agree to take your case; but I do protest against this stagnation and utter absence of real current in the business of the bar. It is neither good for the litigants, for the Bar, nor for the Judges. It makes the business of the court much more difficult, and as far as the clients are concerned, every delay costs them money." Mr. *Jenkins*: "After your Lordship's expression of opinion I will always tell my clients that they had better go on with the juniors in the event of the leaders' absence." Mr. Justice *Farwell*: "The leader's absence is the junior's opportunity."

***

*Liability of Restaurant-keepers.*—According to the decision of Judge *Rentoul* in *Druiffe* v. *Spiers and Pond.* (*Lim.*) a Restaurant-keeper is not liable to a customer for the theft of an overcoat, hung by the customer upon a peg in the dining-room. There was no negligence, he said; for the defendants could not be expected to have some one continually watching each rail on which hats and coats were hung. At first sight the case bears a

afe Royal case (*Ultzer* v. *Nichols*), but in the Cafe Royal a waiter had taken ng it up, and the verdict of the jury ere was both a bailment and negligence. plaintiff was upheld on appeal to the e Mr. Justice *Charles* considered that there n points, but Mr. Justice *Wright* only held hat there was no bailment had not been clearly e trial and could therefore not be raised on appeal. present case the servants of the defendants had done no act rom which a promise to take charge of the coat could be inferred. As *Archard* v. *Bush*, however, shows, the liability is greater when the *locus in quo* is an inn and the relation between the proprietor and the customer is that of inn-keeper and guest; for an inn-keeper, like a common carrier, is at common law liable for the loss of his guests' property, otherwise than by the Act of God or of the King's enemies. But a mere restaurant, 'a place where accommodation is not provided for passengers and way-faring men,' to quote from Calye's case, is not an inn.

***

*Divorce Cases and Co-respondents.*—Sir *Gorell Barnes* expressed, says the *Pall Mall Gazette*, a very sound view in the course of a divorce case which he disposed of recently. He had been asked to conceal the name of a co-respondent at a previous hearing, and declined to do so. The result of his refusal was a report of the case which led to the offer of important evidence. As the Judge said, the cases are rare in which it is not desirable on public grounds that the names of persons called before the Courts should be made known. Publicity has become an important aid to justice, and the soundest policy is to make no reservation on behalf of individuals unless it can be shown that there are other than merely private reasons for doing so. Every prisoner and most witnesses would like their names to be concealed, but the privilege cannot be given to all, and justice has higher claims than sentiment. It is rarely possible for a judge to determine when asked to conceal a name, whether some interst may not suffer if he consents to do so.

***

*A 5-Century Old German Law-*
which has been in progress since the y
authority of Friemar, a suburb of Got
in a neighbouring village, was amicabl
after 478 years of constant litigation,
the suit, which has swallowed up enormo
was the action of the mill-owners in raising
tion the height of a dam in the River Nesse, in o
the supply of water to their mills.

*Decisions 'per incuriam'*:—The industry of counsel and th
learning of judges sometimes fail to prevent decisions being given in temporary forgetfulness of some particularly relevant section in an Act of Parliament. It is fortunate when the forgotten enactment comes to light in time to have the erroneous decision reversed on appeal. This, however, does not always happen. A decision of the Court of Appeal was a few years ago reversed in the House of Lords on the strength of an enactment then overlooked—*The Capital and Conuties Bank* v. *Gordan.*[1] In the Court of appeal no mention was made of the existence of S. 19 of Stamp Act, 1853 (C. 59) although this section was probably intended to be repeated by the Bills of Exchange Act, 1882. The mistake was discovered before it was too late and the matter was put right in the higher Court. Quite recently it has been discovered that in 1901 a decision was given by Mr. Justice *Kekewich* which certainly would not have been given, but for a most important section of the Wills Act, 1837, having been overlooked. In this case the mistake has been discovered too late for rectification. In *In re Broad*[2] it was held that an imperfectly executed will, nevertheless, operated as an exercise of a power of appointment, S. 10 of the Wills Act, 1837 on this point being, by some extraordinary accident, altogether overlooked. Mr. Justice *Warrington* (then at the Bar) was counsel for the plaintiff in whose favour the decision was given. The same point arose in *In re Barnett*[3] before Mr. Justice *Warrington*, and *In re Broad* was cited. Mr. Justice *Warrington* admitted that this S. 10 was entirely overlooked in *In re Broad* and added, "whether we all forgot it or not, I do not know." As might have been expected, *In re Broad* was not

1. (1903) A. C. 240.
2. (1901) 2 Ch. 86.
3. (1908) 1 Ch. 402.

t poor consolation for the unsuccessful d the recent decision of *In re Barnett* —*English Law Journal.*

---

## cknowledgments.

eipt of the following publications :—

Manual by P. N. Chatterjee.

| | |
|---|---|
| Journal for | February. 1908 |
| Lawyer | Do. |
| erican Law Review | Do. |
| Australian Law Times | Do. |
| Bombay Law Reporter | Do. |
| Burma Law Reporter | Do. |
| Calcutta Law Journal | Do. |
| Calcutta Weekly Notes | Do. |
| Canada Law Journal | Do. |
| Canada Law Times | Do. |
| Hindustan Review | Do. |
| Central Law Journal | Do. |
| Chicago Legal News | Do. |
| Commonwealth Law Review | Do. |
| Criminal Law Journal | Do. |
| Educational Review | Do. |
| Harvard Law Review | Do. |
| Indian Review | Do. |
| International Police Magazine | January 1908. |
| Kathiawar Law Reports | February 1908. |
| The Law Journal | Do. |
| Law Students' Helper | Do. |
| Law Students' Journal | Do. |
| Law Notes | Do. |
| The Lawyer | Do. |
| Green Bag | Do. |
| Michigan Law Review | Do |
| Punjab Law Reporter | Do. |

---